

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
APPENDIX**

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74-2267

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
UNITED STATES OF AMERICA, :
: *D*
Appellee, : *Y*
: *Y*
-against- :
OSWALDO LONDONO-ECHEVERRY : Docket No. 74-2267
: *Y*
Appellant. :
: *Y*
-----x

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

WILLIAM EPSTEIN

Of Counsel

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PAGINATION AS IN ORIGINAL COPY

CRIMINAL DOCKET

TITLE OF CASE

ATTORNEYS

For 17

Woodfield

THE UNITED STATES

U.S.

SEYNALDO SANTIAGO-LUGO,

OSWALDO LONDONO-ECHEVERRY

~~LONDONO-EGHEVERRY~~

For Defendant: Frank A. Lopez

31 Smith St.- B'klyn. N.Y.

237-9500

Did possess cocaine

Part II

PROCEEDINGS

2-5-74 Before BARTELS,J.- Indictment filed

2-8-74 Govts Notice of Readiness for Trial filed

2-6-74 GOVS Notice of Motion
2-11-74 Before COSTANTINO, J. - Case called- Defts and counsels present - Defts
arraigned and each enters a plea of not guilty- Case set down for trial
on 3-11-74 Defts in custody

2 7 74 Magistrate's file 74 M 177 inserted into CR file.

3-7-74 Magistrate's file /4 M 17
3-11-74 Before COSTANTINO J - case called - deft Lugo & counsel Mr. Tomei

present - Erny Trumpy sworn as interpreter - deft arraigned and having been advised of his rights and on his own behalf enters

a plea of guilty to counts 1 and 2 - after withdrawing his plea
he did without date - defts in custody -

of not guilty - sentence adjd without date - defts in custody -
case as to deft OSWALDO LONDONO-ECHEVERRY adjd to 4-1-74 for trial.

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74 CR 89

| DATE | PROCEEDINGS | CLERK'S FEES | |
|---------|---|--------------|-----------|
| | | PLAINTIFF | DEFENDANT |
| 4-1-74 | Before COSTANTINO J - case called - deft LONDONO-ECHEVERRY & atty present - adjd to 4-8-74 for trial. | | |
| 4-8-74 | Before COSTANTINO, J.- Case called- Deft and counsel and interpreter Maria E. Cardenas present- Court relies assigned counsel- Case adjd to 4-24-74 at 10:00 A.M. for trial (LONDONO-ECHEVERRY) | | |
| 4-8-74 | Notice of appearance filed (LONDONO-ECHEVERRY) | | |
| 4-24-74 | Before COSTANTINO J - case called - deft Londono-Echeverry & counsel Mr. Rosenberg xx present - Interpreter Maria Cardenas present - xx oral motion to withdraw as atty granted - court appoints Legal Aid - case set for May 1, 1974 to set date for trial. | | |
| 5-1-74 | Before COSTANTINO, J.- Case called- Deft and counsel Marion Seltzer of Legal Aid present- Interpreter Daisy Santos sworn- Case set down for trial on 5-13-74 at 10:00 A.M. for deft LONDONO-ECHEVERRY- Sentence as to deft SANTIAGO-LUGO adjd from 5-3-74 to 5-17-74 at 10:30 A.M. | | |
| 5-13-74 | Before COSTANTINO J - case called - deft LONDONO-ECHEVERRY & counsel M. Seltzer of Legal Aid present with interpreter Emil Rodriguez - case adjd to June 3, 1974 for trial. | | |
| 5-17-74 | Before COSTANTINO J - case called & sentence adjd to June 7, 1974 (SANTIAGO-LUGO) | | |
| 5-23-74 | Govts Memorandum of Law filed (LONDONO-ECHEVERRY) | | |
| 6-3-74 | Before COSTANTINO, J.- Case called- Deft and counsel Marion Seltzer of Legal Aid present- with interpreter Emil Rodriguez- Adjd to 6-17-74 for trial at 10:00 A.M. | | |
| 6-7-74 | Before COSTANTINO J - case called - deft SANTIAGO-LUGO & counsel A. Tomei present - Interpreter E. Trumdy present - deft sentenced to imprisonment for 6 years on each of counts 1 and 2 to run concurrently and 6 years special parole term - deft to be deported after completion of sentence. On motion of AUSA Kimelman deft to be held at West St. Federal Detention Headquarters until so directed. | | |
| 6-7-74 | Judgment & Commitment filed - certified copies to Marshal (SANTIAGO-LUGO) | | |
| 6-13-74 | Certified copy of Judgment and commitment retd and filed- deft delivered to Federal Detention Headquarters (SANTIAGO LUGO) | | |
| 6-17-74 | Before COSTANTINO J - case called - deft Londono-Echeverry & counsel M. Seltzer of Legal Aid present with Interpreter Emil Rodriguez - adjd to June 19, 1974 @ 9: 15 am for trial. | | |
| 6-19-74 | Before COSTANTINO J - case called - deft Echeverry & atty M. Seltzer present - Daisy Santos present - interpreter sworn - suppressing hearing begun - Motion to suppress tapes is denied - Hearing concluded. | | |

| DATE | PROCEEDINGS |
|---------|---|
| 6-19-74 | Before COSTANTINO J - case called - deft & atty M. Seltzer present - trial ordered & BEGUN - Jurors selected and sworn - Trial continued without date (Echeverry) |
| 6-24-74 | Voucher for compensation of counsel filed (Santiago-Lugo) |
| 6-27-74 | Before COSTANTINO, J. - Case called- Deft and counsel present- Interpreter Richard Mira present and sworn- Trial resumed- Trial contd to 6-28-74 10:00 A.M. (ECHEVERRY) |
| 6/28/74 | Before COSTANTINO, J. - Case called- Deft, atty and interpreter present Motion to dismiss the indictment -Motion denied-Trial cont'd to 7/1/74 |
| 7/1/74 | Before COSTANTINO, J. - Case called- Deft, atty and interpreter present (deft L-ECHEVERRY and counsel M. Seltzer)-Trial resumed- Trial cont'd to 7/2/74 |
| 7-2-74 | Before COSTANTINO, J. - Case called- Deft and counsel present- Interpreter present-Trial resumed-Order of sustenance signed-Trial contd to 7-3- at 10:00 A.M. (LONDONO-ECHEVERRY) |
| 7-2-74 | By COSTANTINO, J. - Order of sustenance filed |
| 7-3-74 | Before COSTANTINO, J. - Case called- Deft and counsel and Interpreter present- Trial resumed- Jury resumes deliberations- Jury returns at 1:00 P.M. and finds the deft guilty as to counts 1 and 2- Jury polled- Jury discharged- Trial concluded- Sentence adjd without date (LONDONO-ECHEVERRY) |
| 7-3-74 | Stenographers Transcript dated 6-27-74, 6-28-74 and 7-1-74 filed |
| 7-8-74 | Voucher for compensation of expert services filed (Londono- Echeverry- (Ricardo Mira interpreter) |
| 7/12/74 | Voucher for expert services filed. (ECHEVERRY) |
| 7-26-74 | Stenographers Transcript dated 7-2-74 filed |
| 8-1-74 | Notice of motion for a reduction of sentence filed ret 9-17-74 (SANT) |
| 9-9-74 | Petition for Writ of Habeas Corpus Ad Testificandum filed |
| 9-9-74 | By Costantino J - Writ Issued, ret. 9-17-74 (Santiago Lugo) |
| 9/17/74 | Before COSTANTINO, J. - Case called- Motion adjd to 9/23/74 |
| 9-20-74 | Before Costantino J - case called - deft Echeverry & counsel M. Seltzer of Legal Aid present - deft sentenced on each of counts 1 and 2 for a period of 4 years to run concurrently plus special parole term of 6 years and deft to be deported upon completion of his prison term. Deft advised of right to appeal without prepayment of fees. |
| 9-20-74 | Judgment & Commitment filed - certified copies to Marshal (Echeverry) |

| DATE | PROCEEDINGS |
|----------|--|
| 9-23-74 | Before Costantino J - case called on motion for reduction of sentence - Deft & counsel Albert Tomei present - Alicia Mira present (Interpreter) Motion/granted and sentence reduced to 4 years imprisonment. |
| 9-23-74 | Amended Judgment & Commitment filed - certified copies to Marshal. |
| 9-13-74 | 2 stenographic transcripts filed re deft Santiago-Lugo (one dated March 11, 1974 and one dated June 7, 1974) |
| 9-24-74 | xxxxxx Writ retd and filed- executed (SANTIAGO-LUGO) |
| 9-25-74 | Notice of appeal filed (LONDONO-ECHEVERRY) |
| 9-25-74 | Docket entries and duplicate of notice of appeal mailed to c of appeals |
| 10/1/74 | Certified copy of Order for reduction of sentence retd and filed-deft to be retd to U.S. Penitentiary at Lewisburg Penn (SANTIAGO-LUGO) |
| 10-1-74 | Certified copy of Judgment and Commitment retd and filed- Deft delivered to Federal detention Headquarteres (LONDONO-ECHEVERRY) |
| 10/8/74 | Voucher for compensation of counsel filed (SANTIAGO-LUGO) |
| 10/9/74 | Stenographers Transcript dated 9/20/74 |
| 10-11-74 | Voucher for Expert Services filed (Echeverry) |
| 10/15/74 | Stenographers Transcript dated 7/3/74 filed |

| | |
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| A TRUE COPY | |
| ATTEST | |
| DATED | 10/17/74 |
| LEWIS ORGEL | |
| BY | CLERK |
| DEPUTY CLERK | |

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

74CR 89

----- X
UNITED STATES OF AMERICA

INDICTMENT

- against -

REYNALDO SANTIAGO-LUGO
OSWALDO LONDONO-ECHEVERRY,

Cr. No.
(T. 21, U.S.C., §841(a)(1) and
T. 18, U.S.C., §2)

Defendants.

----- X
THE GRAND JURY CHARGES:

COUNT ONE

On or about the 28th day of January 1974, within the Eastern District of New York, the defendant REYNALDO SANTIAGO-LUGO and the defendant OSWALDO LONDONO-ECHEVERRY, did knowingly and intentionally possess with intent to distribute approximately 1/8 kilogram of cocaine, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.)

COUNT TWO

On or about the 28th day of January 1974, within the Eastern District of New York, the defendant REYNALDO SANTIAGO-LUGO and the defendant OSWALDO LONDONO-ECHEVERRY, did knowingly and intentionally distribute approximately 1/8 kilogram of cocaine, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.)

A TRUE BILL

Yolanda G. Colstiel

FOREMAN.

Edward John Bond Jr.
UNITED STATES ATTORNEY GAW
EASTERN DISTRICT OF NEW YORK

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FL:GA
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2 Charge of the Court

3 Mr. Foreman, ladies and gentlemen of the jury:

4 We now come to the final stage of the proceedings.
5 The Court will now Charge you on the law to be
6 applied to the facts in the case.7 As you may recall, I initially gave you a pre-
8 Charge as to the manner in which the case would be
9 presented to you. I told you that most of the evidence
10 in the case would come in the form of the testimony of
11 witnesses, and that you were to pay special attention
12 to the manner in which the witnesses testified.13 I believe I also instructed you that you would
14 be the judges of the facts in the case, that being your
15 sole province; and that your recollection of the facts
16 after having heard all of the evidence in the case --
17 the testimony of witnesses and the documentary proof
18 was to control the determination of the issues.19 Likewise at that time I told you that I would
20 not be the judge of the law. This has not changed at this
21 stage of the proceedings. I will not review the facts
22 in this case for you because I am certain that with
23 Summations by the attorneys there is no need for the
24 Court to review the facts. In any event, if you find
25 that there is some fact in the case that you may have
forgotten or don't recollect, or you can't agree with

1 Charge of the Court

2 each other in your deliberations, you can have it read
3 back from the record, and that will, I am sure, refresh
4 your memory.

5 In any event, I am the judge of the law. You
6 must accept what I say to be the law in this case.

7 Now, the attorneys have been permitted by the
8 Court and by the rules to make Opening statements and
9 Summations to you. Under no circumstances are the state-
10 ments they have made by way of Opening or by way of
11 Summation to be taken as evidence. However, the Court
12 and the law does permit you to take the arguments that
13 they have proffered before you and weigh those arguments.
14 And if you agree with what they have said on either side
15 of the case, you may use those arguments in your deliber-
16 ations and in discussing the case with each other, and
17 try to convince one another as to what the final deter-
18 mination shall be with reference to the deliberations at
19 hand.

20 If you feel that the arguments are not commensur-
21 ate with the testimony and the proof in the case, you
22 may disregard them. The arguments are not evidence.
23 You need not weigh them. However, there are times when
24 the arguments of the attorneys will give you an insight
25 as to something you may have missed, and you may discuss
that portion of it if you so desire.

Now, of course, I also said to you that during the trial the Court will be the judge of the law. Likewise, as to motions which at times we had at a side bar, as you may recall. That was not for the purpose of keeping any of the proof from you, but were matters of law that were discussed between the attorneys and the Court itself and should not have come before you. In any event, if you feel that you have discovered by some stretch of your imagination what this Court thinks as to either some of the testimony or the case itself, you should remove that from your mind because I tell you here and now I have come to no conclusion in this case, nor have I indicated to you in any way whatsoever what what my feeling is with reference to the facts in the case, or with reference to the guilt or innocence of the defendants. That is your province and your job. You should not try to weigh what you believe the Court's impression may be.

You must understand that the lawyers who appear before you are advocates. They are advocating the best case they can for the parties they represent, and they have a right to exercise as much forcefulness as they desire in their questioning, or otherwise in presenting their case. I say this because this is within the framework of the ordinary trial.

1 Charge of the Court

2 Of course, you know by this time that this case
3 has come before you by way of an indictment presented
4 by a Grand Jury sitting in this Eastern District. That
5 indictment charges the defendant with the Counts I shall
6 now read to you. Remember, the indictment is merely
7 an accusation, merely a piece of paper. It is not evi-
8 dence, and is not proof of anything.

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R3a fls 10

(continued on next page.)

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Charge of the Court

THE COURT: (Continuing.) Count One: On or

about the 28th day of January 1974, within the

Eastern District of New York, the defendant Oswaldo

Londono-Echeverry, did knowingly and intentionally

possess with intent to distribute approximately one-

eighth kilogram of cocaine, a Schedule II narcotic

drug controlled substance. (Title 21, United States

Code, Section 841(a)(1) and Title 18, United States

Code, Section 2.)

Count Two: On or about the 28th day of

January 1974, within the Eastern District of New

York, the defendant Oswaldo Londono-Echeverry, did

knowingly and intentionally distribute approximately

one-eighth kilogram of cocaine, a Schedule II

narcotic drug controlled substance. (Title 21,

United States Code, Section 841(a)(1) and Title 18,

United States Code, Section 2.)

Section 841(a)(1) reads in pertinent part as

follows:

Except as authorized by this subchapter, it

shall be unlawful for any person knowingly or

intentionally ... to distribute or possess with

intent to distribute ... a controlled substance.

Cocaine is a controlled substance.

2 Both counts of the indictment also charge the
3 defendant with being an aider and abettor.

4 Section 2 of Title 18 of the United States
5 Code reads as follows:

6 (a) Whoever commits an offense against the
7 United States or aids, abets, counsels, commands,
8 induces or procures its commission, is punishable
9 as a principal.

10 (b) Whoever willfully causes an act to be
11 done which if directly performed by him or another
12 would be an offense against the United States, is
13 punishable as a principal.

14 The essential elements of Count One of the
15 indictment, all of which the government must prove
16 beyond a reasonable doubt or else you must acquit
17 the defendant, are as follows:

18 First, that the defendant possessed approxi-
19 mately one-eighth kilogram of cocaine;

20 Second, that he possessed the cocaine with the
21 intent to distribute it;

22 Third, that he understood that the substance he
23 possessed was cocaine, or some other illegal drug;
24 and

25 Fourth, that he understood he was acting

2 illegally.

A person who, although not in actual possession,
knowingly has both the power and the intention, at a
given time, to exercise dominion or control over a
thing, either directly or through another person or
persons, is then in constructive possession of it.

12 You may find that the element of possession as
13 that term is used in these instructions is present
14 if you find beyond a reasonable doubt that the
15 defendant had actual or constructive possession,
16 either alone or jointly with others.

17 You may find that the goods, cocaine, mentioned
18 in the indictment were in the defendant's possession
19 if you find beyond a reasonable doubt that the de-
20 fendant knowingly had them in his power or under his
21 control, even though it may have been in the actual
22 physical possession of another. Since actual
23 manual or personal possession by the defendant is
24 not a necessary element of the crime.

The term "distribute" means to deliver. The

1 4 Charge of the Court

2 term "deliver" means the actual, constructive, or
3 attempted transfer of a controlled substance.

4 The essential elements of Count Two are as
5 follows:

6 First, that the defendant distributed approxi-
7 mately one-eighth kilogram of cocaine;

8 Second, that he understood the substance he
9 distributed was cocaine or some other illegal drug;
10 and

11 Third, that he understood that he was acting
12 illegally.

13 Both counts of the indictment also charge the
14 defendant with being an aider and abettor.

15 In order to aid and abet another to commit a
16 crime it is necessary that an accused willfully
17 associate himself in some way with the criminal
18 venture, and willfully participate in it as he would
19 in something he wishes to bring about; that is to
20 say, that he willfully seeks by some act or omission
21 of his to make the criminal venture succeed.

22 An act or omission is "willfully" done, if
23 done voluntarily and intentionally and with the
24 specific intent to do something the law forbids, or
25 with the specific intent to fail to do something the

1 5 Charge of the Court

2 law requires to be done; that is to say, with bad
3 purpose either to disobey or to disregard the law.4 You of course may not find a defendant guilty
5 unless you find beyond a reasonable doubt that every
6 element of the offense as defined in these in-
7 structions was committed by some person or persons,
8 and that the defendant participated in its commission.9 Mere presence at the scene of the crime and
10 knowledge that a crime is being committed are not
11 sufficient to establish that the defendant aided and
12 abetted the crime, unless you find beyond a reasonable
13 doubt that the defendant was a participant and not
14 merely a knowing spectator.

15 (Continued on next page.)

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Charge of the Court

THE COURT: (Continuing.) Now, there are in any case, and in this one, two types of evidence from which a jury may properly find a defendant guilty of a crime, one is direct evidence such as testimony of an eyewitness, the other is circumstantial evidence which is proof of a chain of facts and circumstances pointing to the commission of the offense.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that before convicting a defendant the jury must be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

A defendant is presumed innocent of the crime. Thus the defendant, although accused, begins the trial with a clean slate and with no evidence against him, and the law permits nothing but legal evidence to be presented before a jury to be considered in support of any charge against the accused, so that the presumption of innocence alone is sufficient to acquit a defendant unless you, the jury, are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of

1 2 Charge of the Court

2 all the evidence in the case.

3 It is not required that the government prove
4 guilt beyond all possible doubt. The test is one of
5 reasonable doubt, and reasonable doubt is doubt based
6 upon reason and common sense, the kind of doubt
7 that would make a reasonable person hesitate to act.
8 Proof beyond a reasonable doubt must, therefore, be
9 proof of such a convincing character that you would
10 be willing to rely and act upon it unhesitatingly in
11 the most important of your own affairs.

12 You, the jury, will remember that a defendant
13 is never to be convicted on mere suspicion or con-
14 jecture. The burden is always upon the prosecution
15 to prove guilt beyond a reasonable doubt. This
16 burden never shifts to a defendant. The law never
17 imposes upon a defendant in a criminal case the
18 burden or duty of calling any witnesses or producing
19 any evidence.

20 A reasonable doubt exists whenever, after
21 careful and impartial consideration of all the
22 evidence in the case, the jurors do not feel con-
23 vinced to a moral certainty that a defendant is
24 guilty of the charge. So, if the jury views the
25 evidence in the case as reasonably permitting either

3 Charge of the Court

of two conclusions, one of innocence, the other of guilt, you, the jury, should, of course, adopt the conclusion of innocence.

I have said that the defendant may be proven guilty either by direct or circumstantial evidence.

I have said that direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness. Also circumstantial evidence is proof of a chain of facts and circumstances indicating the guilt or innocence of a defendant. You, the jury, may make common sense inferences from the proven facts.

It is not necessary that all inferences drawn from the facts in evidence be consistent only with guilt and inconsistent with every reasonable hypothesis of innocence or that there must be no reasonable doubt as to each chain of proof. The test is one of reasonable doubt, and should be based upon all the evidence, the testimony of the witnesses, the documents offered into evidence and the reasonable inferences which can be drawn from the proven facts.

An inference is a deduction or conclusion which reason and common sense lead the jury to draw.

1 4 Charge of the Court

2 from the facts which have been proved. You are to
3 consider only the evidence in the case. But in your
4 consideration of the evidence you are not limited
5 to the bald statements of the witnesses. On the
6 contrary, you are permitted to draw, from the facts
7 which you find have been proved, such reasonable
8 inferences as seem justified in the light of your
9 own experience.

10 As I stated before, the law never imposes upon
11 a defendant in a criminal case the burden or duty
12 of calling any witnesses or producing any evidence.

13 The crimes charged in this case are serious
14 crimes which require proof of specific intent before
15 a defendant can be convicted. Specific intent to
16 commit the act. To establish specific intent, the
17 government must prove that a defendant knowingly did
18 an act which the law forbids, purposely intending
19 to violate the law. Such intent may be determined
20 from all the facts and circumstances surrounding
21 the case.

22 Intent ordinarily may not be proved directly,
23 because there is no way of fathoming or scrutinizing
24 the operations of the human mind. But you may infer
25 the defendant's intent from the surrounding

1 5 Charge of the Court

2 circumstances. You may consider any statement made
3 and act done by a defendant, and all other facts and
4 circumstances in evidence which indicate his state of
5 mind. It is ordinarily reasonable to infer that a
6 person intends the natural and probable consequences
7 of acts knowingly done or knowingly omitted.

8 The charge in this indictment requires that
9 the government prove that the defendant knowingly
10 or intentionally performed the acts in violation of
11 law. The Court will therefore define the words
12 knowingly and intentionally.

13 An act is done knowingly if done voluntarily
14 and intentionally, and not because of mistake or
15 accident or other innocent reason.

16 The purpose of adding the word knowingly was
17 to insure that no one would be convicted for an act
18 done because of mistake, or accident, or other
19 innocent reason.

20 (Continued next page.)

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You as jurors are the sole judges of the credibility of the witnesses and the weight their testimony deserves, and it goes without saying that you should scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and his demeanor and manner while on the stand. Consider the witness' ability to observe the matters as to which he has testified, and whether he impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and the innocent misrecollection, like failure of recollection is not an uncommon experience.

1 Charge of the Court

2 In weighing the effect of a discrepancy, always
3 consider whether it pertains to a matter of importance
4 or an unimportant detail, and whether the discrepancy
5 results from innocent error or intentional falsehood.

6 After making your own judgment, you will give
7 the testimony of each witness such credibility, if any,
8 as you may think it deserves. Another test that you
9 can use in determining the truthfulness or credibility
10 of a witness is to use your own good common sense in
11 addition to these essentials that I have given you.

12 You can use your good common sense as you do in your
13 everyday experience where you must make important deci-
14 sions based upon what others tell you. When you decide
15 to either accept or ignore the statements of others,
16 you use your common sense. Your good judgment will say
17 to you somehow or other that whatever they say does not
18 appear to be truthful, that somehow or other you just
19 do not believe what they have said. That is your abil-
20 ity to determine the truthfulness of the person you are
21 speaking with. Likewise, your common sense should be
22 used to determine the weight to be given the testimony
23 of a witness.

24 You take that same good common sense into the
25 jury room, you do not leave it outside. In addition to

Charge of the Court

what I have said, use your common sense as a test in exercising your good judgment and in determining whether or not this defendant is guilty of the crimes charged.

It is for you to determine whether the witnesses in this case have testified truthfully, whether or not they have an interest in the case, what that interest may be and how great it is, and whether or not they have told you falsehoods. This is all for you to determine.

When a defendant in a case of this kind takes the stand, which he has a perfect right to do, he is subjected to all the obligations of witnesses, and his testimony is to be treated like the testimony of any other witnesses; that is to say, it will be for you to say, remembering the substance of his testimony, the manner in which he gave it, his cross-examination, and everything else in the case, whether or not he told the truth. Then, again, it is for you to remember, you have a perfect right to do so, the very grave interest the defendant has in the case. As he places himself as a witness, he stands like any other witness.

Evidence that at some other time a witness, other than the accused, has said or done something, or has failed to say or do something, which is inconsistent with the witness' testimony at the trial, may be con-

1 Charge of the Court

2 sidered by the jury for the sole purpose of judging the
3 credibility of the witness; but may never be consideeed
4 as evidence or proof of the truth of any such statement.

5 Where a witness is a defendant on trial in the
6 case and, by such statements or other conduct, the
7 defendant admits some fact against his interest, then
8 the statement or other conduct, if knowingly made or
9 done, may be considered as evidence of the truth of the
10 fact so admitted, as well as for the purpose of judging
11 the credibility of the defendant as a witness.

12 An act or omission is "knowingly" done, if done
13 voluntarily and intentionally, and not because of mistake
14 or accident or other innocent reason.

15 Every witness' testimony must be weighed as to
16 its truthfulness. If you find any witness lied as to
17 any material fact in the case -- then the law gives you
18 certain privileges. One of those privileges is that
19 you have the right to disregard the entire testimony of
20 that witness. If you find, however, that you can sift
21 through that testimony and determine which of the testi-
22 mony is true and which was false, then the law allows
23 you to take the portions which were true and weigh it
24 and disregard those portions which were false. That,
25 again, is within your prerogative.

1 Charge of the Court

2 The weight of the evidence is not necessarily
3 determined by the number of witnesses testifying on
4 either side. You should consider all the facts and
5 circumstances in evidence to determine which of the
6 witnesses are worthy of greater credence. You may find
7 that the testimony of a smaller number of witnesses on
8 one side is more credible than the testimony of a
9 greater number of witnesses on the other side.

10 You are not obliged to accept testimony, even
11 though the testimony is uncontradicted and the witness
12 is not impeached. You may decide, because of the
13 witness' bearing and demeanor, or because of the inher-
14 ent improbability of his testimony, or for other reasons
15 sufficient to you, that such testimony is not worthy of
16 belief.

17 The Government is not required to prove the
18 essential elements of the offense as defined in these
19 instructions by any particular number of witnesses. The
20 testimony of a single witness may be sufficient to con-
21 vincing you beyond a reasonable doubt of the existence
22 of an essential element of the offense charged, if you
23 believe beyond a reasonable doubt that the witness is
24 telling the truth.

25 The testimony of an informer who provides evi-

Charge of the Court

2 dence against a defendant for pay, or for immunity from
3 punishment, or for personal advantage or vindication,
4 must be examined and weighed by the jury with greater
5 care than the testimony of an ordinary witness. The
6 jury must determine whether the informer's testimony
7 has been affected by interest, or by prejudice against
8 defendant.

18 If an Accused be proved guilty beyond reasonable
19 doubt, say so. If not so proved guilty, say so.

Keep constantly in mind that it would be a violation of your Sworn duty to base a verdict of guilty upon anything other than the evidence in the case; and remember as well that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

1 Charge of the Court

2 If any reference by the Court or by counsel to
3 matters of evidence does not coincide with your own
4 recollection, it is your recollection which should con-
5 trol during your deliberations.

6 The punishment provided by law for the offense
7 charged in the indictment is a matter exclusively within
8 the province of the Court, and should never be considered
9 by the jury in any way in arriving at an impartial verdict
10 as to the guilt or innocence of the accused.

11 You are here to determine the guilt or innocence
12 of the accused from the evidence in the case. You are
13 not called upon to return a verdict as to the guilt or
14 innocence of any other person or persons. So, if the
15 evidence in the case convinces you beyond a reasonable
16 doubt of the guilt of the accused, you should so find,
17 even though you may believe one or more other persons
18 are also guilty. But if any reasonable doubt remains in
19 your minds after impartial consideration of all the evi-
20 dence in the case, it is your duty to find the accused
21 not guilty.

22 Now, in this type of case there must be a unani-
23 mous verdict, that means all twelve of you must agree,
24 and it goes without saying that it becomes incumbent
25 upon you to listen to one another and to argue out the

Charge of the Court

2 points among yourselves in order to determine in good
3 conscience whether your fellow jurors' argument is one
4 commensurate with yours, or whether at least you can with
5 good conscience agree with him. You have no right to
6 stubbornly and idly sit by and say, "I am not talking
7 to anyone," "I am not going to discuss it," because
8 people with common sense and the ability to reason must
9 communicate, they must communicate their thoughts. So,
10 anything which appears in the record and about which
11 one of you may not agree -- talk it out amongst your-
12 selves, and then, if you can't agree as to what is in
13 the record, well, you can ask the Court to have that
14 portion of the testimony read back to you. You may do
15 so by knocking on the door and giving a note in writing
16 to the Clerk, who will then present it to the Court,
17 and I will then bring you into the courtroom.

18 The Foreman will preside over your deliberations,
19 and will be your spokesman here in court.

(continued on next page.)

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1
2 As to the charges and the Counts in the Indict-
3 ment, you now know there are two. You also know the
4 essential elements that are involved. The Court will
5 permit you to take into your jury room a copy of the
6 Indictment. Each one will have a copy of it. And the
7 form of your verdict will be -- And you, Mr. Foreman,
8 will announce that verdict at the proper time -- If
9 you should find the defendant Not Guilty as to Count
10 One, you would announce it as "We find the defendant
11 Not Guilty as to Count One."

12 If you should find him Not Guilty as to both
13 Counts, the form of your verdict would be "We the jury
14 find him Not Guilty as to both Counts."

15 The other form of verdict would be if you should
16 find him Guilty as to Count One, you would make that
17 announcement, that he is Guilty as to Count One, and if
18 you find him Not Guilty as to Count Two, likewise make
19 that announcement.

20 If you find him Guilty to both Counts, then you
21 would announce it as such.

22
23 (continued on next page.)

1
T-5 R-42
Lewis:wp

CHARGE OF THE COURT

2
3 And that is the Court's charge to the Jury.

4
5 MR. KIMELMAN: Your Honor, may we have a side
6 bar?

7
8 (Discussion Side Bar:)

9
10 THE COURT: First of all, any exceptions?

11
12 Do you have any exceptions?

13
14 MR. SELTZER: I assume you must have charged the
15 definition of reasonable doubt.

16
17 THE COURT: Yes, all the way through.

18
19 MR. KIMELMAN: Your Honor, I would just make an
20 additional request that some type of limiting instruction
21 be given as to the transcripts as an aid to the jury.

22
23 THE COURT: Yes.

24
25 MR. KIMELMAN: I mean they can make their own
determination and they can bring the tapes in.

THE COURT: I'll do that.

MR. KIMELMAN: They can bring the actual tapes
and transcripts into the jury room.

THE COURT: Yes, I'll instruct them.

I did charge reasonable doubt all the way through.

(End Discussion Side Bar)

THE COURT: There is one request that's
been made, and that is as to the transcripts and as to
the tapes. Of course, you realize you can take the

1 CHARGE OF THE COURT

2 transcripts into your jury room. As to the recorder
3 and the tapes, you will be able to take it, but before
4 you take the recorder in someone will have to instruct
5 the foreman to operate the recorder, so that you do not
6 erase any part of the tapes themselves. I am certain
7 there will be no problem. We have a man who can do
8 that for you, but we'll do that after we get back from
9 lunch. If you desire it and think you need it in your
10 jury room, then we'll have it brought in. There is no
11 sense in doing it now.

12 Now, of course, you also know the light in which
13 you must -- when you are deliberating about the tape
14 use the same common sense as you do with any other
15 piece of evidence discussed. Among you in the manner
16 of how you determine the weight of evidence and the
17 credibility it's entitled to.

18 (Marshal sworn.)

19 THE COURT: All right, now, the alternates,
20 if you wish you may go to lunch with them, but you are
21 not to discuss this case at lunch at all, or on the
22 way to lunch or at lunch, and I'll permit the alternates
23 to go since you have been with us and you have spent
24 so much time with us last night, and then after that
25 you can be discharged right from the restaurant, you

CHARGE OF THE COURT

2 need not come. And your term of service is
3 likewise over, and thank you very much for being
4 with us.

(Jury Out.)

(Lunch Recess.)

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AFTERNOON SESSION

(TIME: 4:55 P.M.)

(Lawyers Present, No Jury Present at Present.)

4 THE CLERK: Jury notes from Court's Exhibits 2
5 and 3.

6 THE COURT: They want to know -- first, they want
7 Agent Kobell's testimony read over.

8 Secondly, they want the charge involving
9 possession, aiding and abetting and mere present,
10 which I will read.

11 MR. SELTZER: Smart Jury.

12 THE COURT: What?

13 MR. SELTZER: Smart Jury.

14 THE COURT: Naturally, they are all smart.

15 (Jury in.)

16 THE COURT: All right. The jury has sent a note
17 to the Court in which they request the reading of the
18 testimony of Agent Kobell on rebuttal.

19 They have also sent a note requesting the Court
20 give its charge on possession, aiding and abetting and,
21 what they said, "bystander," but that's mere presence.

22 (Direct and Cross Examination of the Witness
23 Kobell were read by the reporter.)

24 THE COURT: All right, we'll now get into the
25 definition of possession. The law recognizes two kinds

1 of possession, actual and constructive possession.

2 A person who knowingly has direct physical control
3 over a thing at a given time actually is then in
4 possession of it. A person who, but not in full
5 possession, has the power and the intention at a
6 given time to exercise dominion and control over
7 a thing either directly or through another person
8 or persons is then in constructive possession of
9 it.

10 You may find that the elements of possession
11 as that term is used in these instructions are
12 present if you find beyond a reasonable doubt that
13 the defendant had actual constructive possession
14 either alone or jointly with others.

15 You may find that the goods, cocaine, mentioned
16 in the indictment were in the defendant's possession
17 if you find beyond reasonable doubt that the
18 defendant knowingly had them in his power or under
19 his control, even though it may have been in the
20 actual physical possession of another, since actual
21 manual personal possession by the defendant is not
22 a necessary element of the crime.

23 Both counts in the indictment also charge
24 the defendant with being an aider and abettor. In
25 order to aid or abet another to commit a crime is

1 is necessary but the accused wilfully associate
2 himself in some way with the criminal venture
3 and wilfully participate in it as he would in
4 something he wishes to bring about; that is to
5 say, that he wilfully seeks by some act or omission
6 of his to make the criminal venture succeed.

7 An act for omission is wilfully done if
8 done voluntarily or intentionally and with the
9 specific intent to do something the law forbids,
10 or with the specific intent not to do something
11 the law requires to be done; that is to say,
12 with bad purpose is to either disobey or disregard
13 the law.

14 You, of course, may not find a defendant
15 guilty unless you find beyond a reasonable doubt
16 that every element of the offense as defined in
17 these instructions was committed by some person or
18 persons and that the defendant participated in its
19 commission.

20 Mere presence at the scene of the crime and
21 knowledge that a crime is being committed are not
22 sufficient to establish that the defendant aided and
23 abetted in the crime, unless you find beyond a
24 reasonable doubt that the defendant was a participant
25 and not merely a knowing spectator.

1 That's the Court's charge. Now you may retire.

2 (Jury out.)

3 THE COURT: About another half hour.

4 MR. SELTZER: Okay, because I wondered --

5 I mean how late?

6 THE COURT: Then we'll send them home.

7 MR. KIMELMAN; Your Honor, I'd like to go on
8 the record as asking the Court to keep the jury beyond
9 6 o'clock at least.

10 MR. SELTZER: Your Honor, it would seem to me
11 especially in view of the fact that we were all here
12 until approximately 9 o'clock last night listening to
13 evidence, in view of the fact that the jury was brought
14 in at 9:30, early, that keeping them tonight any where
15 past 5:30 or 6 o'clock would put a burden on them to
16 come back with an immediate verdict, if only for the
17 fact that they want to go home because they are tired.

18 THE COURT: I kind of agree with you.

19 MR. SELTZER: I'm

20 THE COURT: I'll keep them until 5:30 and then
21 send them home.

22 MR. KIMELMAN: 6 o'clock?

23 THE COURT: No, 5:30.

24 MR. SELTZER: Just as a suggestion to the
25 Court, I know that you have another jury coming in

2

THE COURT: Yes.

3

MR. KIMMELMAN: At this point the Government
would like to play the second portion of the tape.

5

I will distribute the transcripts.

6

THE CLERK: Government Exhibit 3, previously
marked for identification, now marked in evidence.

8

(So marked)

9

MR. KIMMELMAN: Ladies and gentlemen, again
we are going to run a little test. Put the head
phones on, adjust the volume. We'll start the tape
and then restart it again.

13

(Juror No. 12 raises hand.)

14

THE COURT: What is it?

15

JUROR NO. 12: It's all right, your Honor,
we found the other one.

17

(Test run.)

18

(Said tape played from beginning to end.)

19

AR: (Eng) We are going to see the sample.

20

NOISE 15 SEC.

21

S/AG G: (Eng) Tell him, I don't like doing
this, tell him if...

23

AR: (Eng) Yeah, I know - (Spanish) that we
don't want - we don't want to get ripped off.

25

SL: What do you mean - you don't want how's
that

1
2 AR: Yeah, sure that you want to give us a
3 hold up. You want to rip us off - you know - you
4 want to get our money.

5 SL: No, man, No - it's for you to see - if
6 you like it - if you...

7 S/AG G: (Eng) Hey hand it to me - I'm not gettin in
8 no car because I don't want to be ripped off -
9 I don't want to meet your friend - tell him -
10 I don't want to don't want to meet your friend all
11 I want to do is see the merchandise.

12 AR: And he's right - we're afraid that
13 you come out with pistols.

14 SL: No way, no...

15 AR: He doesn't even want to see it...

16 LE: Let's go, let's go, hurry up, let's go.

17 S/AG G: (Eng) Alright let me see.

18 SL: (Eng) No problem, no problem (Spanish)
19 We don't have none of those problems brother, we
20 just want you to see it. (Eng) We want...

21 LE: Leave it - tell him to tell you... I'm
22 leaving I'm leaving.

23 AR: OK he's interested. Tell him, brother
24 that he'll see it brother.

25 S/AG G: (Eng) I'll go too - I can't get in

2 the car tell him that I'm afraid, do you speak
3 English? I'm afraid.

4 LE: (Eng) I understand, he has no problem
5 with you (Spanish) Do you know him?

6 AR: (Eng) Yeah

7 LE: Well, the problems are his.

8 S/AG G: (Eng) I'm his brother, I trust him.

9 SL: Nobody is asking him for money, or asking
10 him for nothing, we only want to see it - to see it.

11 AR: (Eng) It's okay no problem, go see it if
12 you like.

13 S/AG G: (Eng) Look it, but tell him, I'll
14 show him the money.

15 LE: Look, that I'm all screwed with that
16 stuff here man, tell him that I can't stay here.

17 AR: (Eng) He's said he doesn't want to see
18 it to into the car, look at it, if you think you can
19 buy it...

20 S/AG G: (Eng) No can't we stay right here and
21 look at it?

22 AR: (Eng) Yes.

23 S/AG G: (Eng) We are not going to drive
24 somewhere.

25 LE: (Eng) No, No more, come in here.

2 S/AG G: (Eng) Paul, Ah, wait right here, you
3 stand right out here and watch.

4 SL: He thinks we are going to shoot him
5 or something.

6 (CONVERSATION UNINTELLIGIBLE)

7 AR: Let's see, let me see

8 SL: Go in, go in, go in.

9 AR: (Eng) Let me get in, let me get in.

10 SL: Nobody is going to do nothing to you.

11 Nothing - my love.

12 S/AG G: (Eng) Oh, this is more than a sample.
13 This is an enghth. (Spanish) one?

14 SL: One, no, no it didn't reach for two
15 brother, no didn't reach for two.

16 AR: (Eng) Not two

17 S/AG G: (Eng) Only one, Smells good, Yeah

18 SL: Yeah, ne things that we are going
19 to take out a gun, we don't talk bullshit, we are not
20 playing brother - you can't play with that brother.

21 LE: If he likes that one... tell him that
22 I can get him, the other one later.

23 SL: For tomorrow, for tomorrow.

24 AR: (Eng) He says, if you like this one, he
25 can get you this for later, The other one later or

1

Transcript

80

2

both tomorrow. What do you think?

3

LE: (Eng) It's 10:20 P.M., (Spanish) tell him that no later than 11:30 or 12:00 I can have him the other one.

6

AR: (Eng) He said 11:30 or 12:00 he has both.

7

S/AG G: (Eng) I feel the rocks and I smell, smell that, here.

9

S/AG G (Eng) Alright - tell him how does he want his money, here take it, it smells good.

11

AR: (Eng) Well what do you say?

12

SL: Does he like it or doesn't he?

13

S/AG G: (Eng) Alright, How much? Good weight.

15

AR: OK - (Spanish) How much is it?

16

LE: I don't know, arrange with him for that.

17

SL: You already know, you have...

18

AR: Well OK how much per... Four thousand?

19

S/AG G: (Eng) Four thousand, right?

20

LE: Yea, yea.

21

AR: (ENG) But, now, we are going to wait for the other or what?

23

(ALL SPEAKING TOGETHER)

24

LE: Why Four Thousand?

25

SL: No, no no - look, you know it has a

1 little cut, do you understand?

2 AR: Yes.

3 SL: Well no, no we are not going to ask for
4 the four thousand, brother. Ok, ok, so now we'll
5 leave it at thirty-six.

6 AR: (Eng) \$3,600 Thousand not four, because
7 it's a little cut.

8 S/AG G: (Eng) How much can it take?

9 AR: You know they are fair

10 LE: (Eng) Maybe half, maybe half.

11 S/AG G: (Eng) One

12 LE: (Eng) In the cut.

13 AR: Yea,

14 LE: Yea

15 (ALL SPEAK AT ONCE)

16 AR: Okay one on it,

17 S/AG G: (Eng) How much do they say we can
18 put on it?

19 AR: (Eng) How many can be put, 2 cuts?

20 SL: Two cuts, what you want...

21 S/AG G: (Eng) Two and a half

22 SL: (Eng) Yes

23 AR: (Eng) What do you think of that, do we
24 wait for another?

25

2 S/AG G: (Eng) Could he get me one more like
3 that?

4 LE: (Eng) Maybe 12:00 in the night or
5 tomorrow.

6 S/AG G: (Eng) How about if we just get it
7 tonight, this tonight and tomorrow we get the one
8 more.

9 LE: (Eng) Okay

10 S/AG G: (Eng) These are interesting prices,
11 How you want to do? Do you want him to go to get
12 the money?

13 LE: OK

14 S/AG G: (Eng) Okay and you wait until he comes
15 back and my friend Carlos comes with him.

16 SL: OK ok

17 AR: Alright - ok

18 SL: You go with them to get the money.

19 No?

20 AR: (Eng) I go with you to bring the money.

21 S/AG G: (Eng) Yeah Yeah

22 AR: (Eng) Ok You wait there?

23 Pause - noise 5 sec.

24 AR: You don't want to wait?

25 LE: (Eng) I park in the other side, ok

2 S/AG G. (Eng) No its better if we don't
3 drive around.

4 AR: Wait here, until he comes with the money,
5 ok? He has to count out the money and all...

6 S/AG G: (Eng) Does he have the merchandise
7 or does the guy in the car?

8 AR: (Eng) Yes, he's got it in his coat.

9 NOISE

10 S/AG G: (Eng) The guy?

11 SL: Tomorrow the next one.

12 NOISE

13 AR: It's because we don't have any phone
14 where to call you.

15 S/AG G: (Eng) Well, they can get one more
16 right?

17 AR: Yes.

18 S/AG G: (Eng) Tell him that I have the
19 money in the trunk, just tell him, I have my money -
20 I put the money in trunk - ok - and also tell him
21 to Montana the guy in the car - in the Ford - ok?

22 AR: (Eng) What?

23 S/AG G: (Eng) Yeah - To Montana the guy
24 in the Ford - do you understand?

25 AR: (Eng) No, No.

2 S/AG C (Eng) Okay, well

3 AR: (Eng) Get in the car

4 S/AG C (Eng) Tell him to get inside and
5 we'll count it on the inside.

6 AR: Out. He says he has to count it out.

7 NOISE

8 S/AG C (Eng) Shut the door, Montana the guy in
9 the car10 AR: Around the corner, Yeah ok he has it
11 with him, he has it with him.

12 NOISE, 10 sec.

13 AR: (Eng) Around the corner around the
14 corner he is. around the corner. go ahead.

15 NOISE

16 AR: (Eng) Around the corner.

17 THE COURT: We'll take a five-minute recess
18 now. Put the ear phones on your chairs.

19 MR. KINNEHAN: Please shut them off.

20 THE COURT: Please pass the transcripts back.

21 (Transcripts collected from the jury by
22 the law clerk.)

23 THE COURT: Very well. Take a recess.

24 (The jury leaves the courtroom.)

25 (Continued on the next page.)

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